

## Proposed Revisions to Section II.E.

### II.E. Affirmative Defense Provision for Excess Emissions During Malfunctions

II.E.1. An affirmative defense to a claim of violation under these regulations is provided to owners and operators for civil penalty actions for excess emissions during periods of malfunction. To establish the affirmative defense and to be relieved of a civil penalty in any action to enforce an applicable requirement, the owner or operator of the facility must meet the notification requirements of Section II.E.2. in a timely manner and prove by a preponderance of evidence that:

II.E.1.a. The excess emissions were caused by a sudden, unavoidable breakdown of equipment, or a sudden, unavoidable failure of a process to operate in the normal or usual manner, beyond the reasonable control of the owner or operator;

II.E.1.b. The excess emissions did not stem from any activity or event that could have reasonably been foreseen and avoided, or planned for, and could not have been avoided by better operation and maintenance practices;

II.E.1.c. Repairs were made as expeditiously as possible when the applicable emission limitations were being exceeded.

II.E.1.d. The amount and duration of the excess emissions (including any bypass) were minimized to the maximum extent practicable during periods of such emissions;

II.E.1.e. All Reasonably possible steps were taken to minimize the impact of the excess emissions on ambient air quality;

II.E.1.f. All emissions monitoring systems were kept in operation (if at all possible);

II.E.1.g. The owner or operator's actions during the period of excess emissions were documented by properly signed, contemporaneous operating logs or other relevant evidence;

II.E.1.h. The excess emissions were not part of a recurring pattern indicative of inadequate design, operation, or maintenance;

II.E.1.i. At all times, the facility was operated in a manner consistent with good practices for minimizing emissions. This Section II.E.1.i. is intended solely to be a factor in determining whether an affirmative defense is available to an owner or operator, and ~~shall does~~ not constitute an additional applicable requirement; and

II.E.1.J During the period of excess emissions, there were no exceedances of the relevant ambient air quality standards established in the Commissions' Regulations that could be attributed to the emitting source.

#### II.E.2. Notification

The owner or operator of the facility experiencing excess emissions during a malfunction ~~shall must~~ notify the Division verbally as soon as possible, but no later than noon of the Division's next working day, and ~~shall must~~ submit written notification following the initial occurrence of the excess emissions by the end of the source's next reporting period. The notification ~~shall must~~ address the criteria set forth in Section II.E.1., above.

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- | II.E.3. The Affirmative Defense Provision contained in this Section II.E. ~~shall not be~~ is not available to claims for injunctive relief.
- | II.E.4. The Affirmative Defense Provision does not apply to failures to meet federally promulgated performance standards or emission limits, including, but not limited to, new source performance standards and national emission standards for hazardous air pollutants. The affirmative defense provision does not apply to state implementation plan (sip) limits or permit limits that have been set taking into account potential emissions during malfunctions, including, but not necessarily limited to, certain limits with 30-day or longer averaging times, limits that indicate they apply during malfunctions, and limits that indicate they apply at all times or without exception.
- | II.E.5. In a federal enforcement action filed under 42 U.S.C. § 7413 or 7604, the decision-making authority shall determine what weight, if any, to assign to the Division's determination that an affirmative defense should or should not be granted.

## Proposed Revisions to Section II.J.

### II.J. Affirmative Defense Provision for Excess Emissions During Startup and Shutdown

II.J.1. An affirmative defense is provided to owners and operators for civil penalty actions for excess emissions during periods of startup and shutdown. To establish the affirmative defense and to be relieved of a civil penalty in any action to enforce an applicable requirement, the owner or operator of the facility must meet the notification requirements of paragraph 2 in a timely manner and prove by a preponderance of the evidence that:

II.J.1.a. The periods of excess emissions that occurred during startup and shutdown were short and infrequent and could not have been prevented through careful planning and design;

II.J.1.b. The excess emissions were not part of a recurring pattern indicative of inadequate design, operation or maintenance;

II.J.1.c. If the excess emissions were caused by a bypass (an intentional diversion of control equipment), then the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;

II.J.1.d. The frequency and duration of operation in startup and shutdown periods were minimized to the maximum extent practicable;

II.J.1.e. All possible steps were taken to minimize the impact of excess emissions on ambient air quality;

II.J.1.f. All emissions monitoring systems were kept in operation (if at all possible);

II.J.1.g. The owner or operator's actions during the period of excess emissions were documented by properly signed, contemporaneous operating logs or other relevant evidence; and,

II.J.1.h. At all times, the facility was operated in a manner consistent with good practices for minimizing emissions. This subparagraph h., is intended solely to be a factor in determining whether an affirmative defense is available to an owner or operator, and ~~shall~~ does not constitute an additional applicable requirement.

II.J.2. Notification: The owner or operator of the facility experiencing excess emissions during startup and shutdown ~~shall~~ must notify the Division verbally as soon as possible, but no later than two (2) hours after the start of the next working day, and ~~shall~~ must submit written quarterly notification following the initial occurrence of the excess emissions. The notification ~~shall~~ must address the criteria set forth in paragraph 1 above.

II.J.3. The Affirmative Defense Provision contained in this section ~~shall not be~~ is not available to claims for injunctive relief.

II.J.4. The Affirmative Defense Provision does not apply to State Implementation Plan provisions or other requirements that derive from new source performance standards or national emissions standards for hazardous air pollutants, or any other federally enforceable performance standard or emission limit with an averaging time greater than twenty-four hours. In addition, an affirmative defense cannot be used by a single source or small group of sources where the excess emissions have the potential to cause an exceedance of the ambient air quality standards or Prevention of Significant Deterioration (PSD) increments.

II.J.5. Affirmative Defense Determination: In making any determination whether a source established an affirmative defense, the Division ~~shall~~will consider the information within the notification required in paragraph 2 of this section and any other information the Division deems necessary, which may include, but is not limited to, physical inspection of the facility and review of documentation pertaining to the maintenance and operation of process and air pollution control equipment.

II.J.6. In a federal enforcement action filed under 42 U.S.C. § 7413 or 7604, the decision-making authority shall determine what weight, if any, to assign to the Division's determination that an affirmative defense should or should not be granted.